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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

CHAD MICHAEL HURNDON,

Defendant and Appellant.

F045284

(Super. Ct. No. CRF03118652)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Cornell, J., and Gomes, J.

Appellant, Chad Michael Hurndon, was found guilty after a jury trial of second degree robbery (Pen. Code, § 211). The jury found true a gun use enhancement (Pen. Code, § 12022.53, subd. (b)). The court sentenced Hurndon to prison for the three-year midterm for robbery plus ten years for the enhancement. Hurndon's total prison term is 13 years.

On appeal, Hurndon contends the trial court erred in not conducting a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 after Hurndon filed written motions for new trial asserting multiple grounds of ineffective assistance of trial counsel. Hurndon further contends the trial court erred in denying his motion due to alleged juror misconduct.

FACTS

A. Offense

On October 15, 2003, between 6:00 and 6:30 p.m., Mary Moore was with her daughter driving an ice cream truck near Church and Cypress in Tulare County. As a red car approached the truck, Moore pulled over believing someone in the car wanted to buy ice cream. The red car pulled over, parking behind the Moore's truck.

A passenger exited the red car and walked to the ice cream truck. When a boy ran out from his home and purchased an ice cream, the passenger from the car turned around and walked back to the driver's side of the red car. When the boy left, the passenger walked up to Moore and demanded she give him all of her money. Thinking the man was joking, Moore started laughing and said, " 'Whatever. What kind of ice cream do you want?' " The man responded saying, " 'No. Give me all of your f'ing money.' " As he said this, the man pulled up his shirt to reveal the wooden handle of a gun.

Moore grabbed money she kept in a cup containing \$5, \$10, and \$20 bills to give to the man. The man impolitely demanded Moore's money a second time. Moore told him she was getting it. The man reached over and grabbed the money from Moore's

hand as well as a bucket containing dollar bills and quarters. The man went back to the car and was driven away. Moore estimated the man took \$100.

Moore called the police from a home in the neighborhood and gave the dispatcher a partial license plate number. Moore identified Hurndon as the robber.

Officer Amy Watkins was dispatched to a home three or four miles from the site of the robbery where a vehicle with a similar license was registered. Watkins saw a man fitting the description of the robber at the residence. An elderly man told Watkins the man's name was Chad. Watkins found a red Geo in the backyard of the residence. Watkins asked the registered owner of the car, Vicky Lucas, for the keys to the Geo. Lucas told Watkins the keys were missing. The hood of the car was warm to the touch. Watkins had the car towed.

Detective Earl Grimes contacted Hurndon's mother, Diane Iskenderian, who told Grimes she received a call from her son on October 17, 2003. During the call Hurndon told his mother he was with a friend who robbed an ice cream truck and hid on the roof of a friend's home when police arrived. Grimes contacted Vicky Lucas who told him she found the keys to the car under the couch after police left the residence. Lucas told Grimes she never loaned the car to anyone who did not reside in her residence.

After Hurndon was arrested on November 13, 2003, he confessed to Grimes that he robbed the ice cream truck. Hurndon stated that he placed a baseball bat under his shirt, approached the truck driver, showed her the end of the bat, and demanded cash. Hurndon denied using a gun to commit the robbery.

An evidence technician who processed the Geo after it was impounded testified that he found several items in the car, including a metal baseball bat. The technician found no gun or ammunition. The technician, however, did not have access to the trunk.

B. Motion for New Trial

Prior to the March 24, 2004, sentencing hearing, Hurndon filed two handwritten motions for new trial. On March 9, 2004, Hurndon filed his first motion alleging his trial

counsel was ineffective for failing to call two witnesses, Soledad Gutierrez, the owner of the home where the Geo was found, and Monica Renteria. Hurndon stated that both witnesses could identify the two individuals who parked the car. Apparently, neither of these individuals was Hurndon. Hurndon asserted his trial counsel failed to have the Geo fingerprinted to establish that Hurndon was not in the car. Hurndon complained that counsel failed to conduct discovery.

Hurndon stated that defense counsel failed to investigate the crime scene to find any witness who could identify the robber. Hurndon asserted that the victim changed her story more than once and trial counsel failed to effectively bring this out at trial. Hurndon contended that defense counsel failed to argue he did not commit the robbery, but focused argument to the jury only on whether he possessed a gun during the robbery. Hurndon further asserted that during trial a prosecution investigator was talking to a juror. At the end of Hurndon's document he wrote, "I the petitioner is [*sic*] asking the court to please look into all of my arguments for a retrial and give me the chance to a fair trial *with a new public defender [sic]*." (Italics added.)

On March 17, 2004, Hurndon filed a second handwritten motion for new trial reiterating several allegations he made in the first document. At the sentencing hearing, Hurndon told the court he had only one opportunity to talk with trial counsel and never "got a chance to get a discovery motion." Hurndon told the court his attorney failed to subpoena witnesses and failed to argue that the witnesses had changed their stories.

Defense counsel, Josephine Banuelos, told the court she was not going to respond and that everything Hurndon was saying " 'borders on what would be heard in *Marsden* hearings.' " Banuelos stated she did meet with Hurndon more than once and that he was fully aware of what she was going to argue at trial.

The court told Hurndon he did not need to respond. The court explained it had read Hurndon's motion and was aware of each of Hurndon's assertions. The prosecutor objected to Hurndon's motion as being untimely. Hurndon complained that Detective

Grimes talked to a juror during the trial. The trial court told Hurndon it conducted an in camera proceeding on that incident and found no misconduct or error.¹ Hurndon stated that he had a letter from one of the witnesses. The letter apparently shed new light on what transpired between the juror and Grimes. The court replied it was not going to consider that point.

The court stated it had considered Hurndon's written motions and that they appeared to relate to whether Hurndon "had effective assistance of counsel." The court found these were matters to raise on appeal and said it would not set aside the verdict.

MARSDEN HEARING

Hurndon contends the trial court failed to conduct a *Marsden* hearing when it became clear in Hurndon's motion for a new trial that he was challenging the competency of his trial counsel. We agree and will reverse.

The decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during trial is within the discretion of the trial court. When a defendant seeks to discharge his counsel on the basis of inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's alleged inadequate performance or that the defendant and counsel have become embroiled in an irreconcilable conflict that undermines effective representation. A defendant may not force the substitution of counsel by his or her own conduct which manufactures a conflict. Furthermore, a judge may not rule on such a motion solely on the basis of the judge's personal observations of courtroom proceedings. A judicial decision made without giving a party an opportunity to present

¹ During the in camera hearing, the court asked Detective Grimes outside the presence of the rest of the jury what Juror No. 7 said to him. Grimes replied she told him to smile because he'll live longer. Grimes replied he had a long night and felt grumpy. The court admonished Grimes not to have any conversation with a juror.

argument or evidence in support of his contention is lacking in all the attributes of a judicial determination. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 786-787.)

A court has no sua sponte duty to initiate a *Marsden* inquiry. The court's duty to conduct the inquiry arises only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective representation by counsel. (*People v. Leonard, supra*, 78 Cal.App.4th at p. 787.)

In *People v. Gay* (1990) 221 Cal.App.3d 1065, 1068-1071, a defendant failed to request new counsel in a lengthy motion filed for new trial and the court held that there was not a clear request to replace trial counsel and the trial court was not obligated, therefore, to conduct a *Marsden* hearing. We find the *Gay* decision inapposite to the instant action because Hurndon clearly requested a new attorney in his written motion for a new trial.

A more recent authority than *Gay* holds that even where a defendant does not expressly seek replacement of counsel, the trial court has a duty to inquire into potential grounds of incompetency when the defendant makes an arguable case for counsel's incompetence. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 580.)

Hurndon raised several grounds for trial counsel's incompetency including failure to investigate the case, failure to investigate or to call other eyewitnesses, failure to conduct discovery, and focusing solely on whether he was armed with a firearm rather than arguing he did not commit the offense. Defense counsel stated that Hurndon's contentions were *Marsden* issues. Yet, the court still failed to conduct a *Marsden* hearing. This was error. It is entirely possible there is no merit to any of these contentions. Nothing about our conclusion is meant to indicate there is merit to Hurndon's motion. (*Ibid.*)

The trial court, however, was placed on clear notice that Hurndon was seeking appointment of a new attorney and failed to conduct the requisite *Marsden* hearing.

Contrary to the trial court's comment during the hearing, the *Marsden* inquiry into the alleged incompetency of trial counsel is a factual matter for resolution by the trial court, not an issue to be resolved by an appellate court.²

ALLEGED JUROR MISCONDUCT

Hurndon further contends the trial court abused its discretion in denying his motion for new trial based on alleged juror misconduct. As noted above in footnote one, the trial court conducted a hearing outside the jury's presence and determined the contact between Detective Grimes and Juror No. 7 was incidental and unrelated to the trial.

At the hearing on the motion for new trial, however, Hurndon asserted he had a letter from a witness. It is not clear from the colloquy between the judge and appellant, but apparently the witness who wrote the letter had new information concerning what was said between Grimes and Juror No. 7. The trial court must fulfill its duty to make the necessary inquiry to resolve the issue of possible juror misconduct. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1255.) The trial court refused to even read the letter Hurndon purportedly had obtained. On remand, Hurndon may explore this issue should he pursue his motion for new trial.

DISPOSITION

The judgment is reversed. On remand, the trial court shall conduct a *Marsden* hearing. Should Hurndon still wish to pursue his motion for new trial on the grounds of ineffective assistance of trial counsel, the court shall appoint independent counsel to investigate the motion. If the trial court does not find adequate grounds for the *Marsden* motion and the motion for new trial, the court shall reimpose judgment.

² Because appellant has challenged the competency of his trial counsel by means of a motion for new trial, the trial court will have to appoint conflict counsel to represent appellant if he pursues his new trial motion. (See *People v. Smith* (1993) 6 Cal.4th 684, 694-697.)